Docket: 2016-1689(IT)G

BETWEEN:

THOMAS HUNT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on April 30 and September 14, 2018
at Vancouver, British Columbia

Before: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	David Davies Alexander Demner Jennifer Flood
Counsel for the Respondent:	David Everett Lisa MacDonell Shannon Fenrich

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AMENDED ORDER

The motion brought by the Appellant pursuant to subsection 58(1) of the *Tax Court of Canada Rules (General Procedure)* for determination of the two questions is dismissed in accordance with the attached Reasons for Order. The Appellant shall pay the Respondent costs of this Motion, in either event of the cause.

This Amended Order and Amended Reasons for Order are issued in substitution of the Order and Reasons for Order dated September 25, 2018.

Signed at **Vancouver, British Columbia**, this 2nd day of **October** 2018.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2018 TCC 193
Date: 2018**1002**
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BETWEEN:

THOMAS HUNT,

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AMENDED REASONS FOR ORDER

Pizzitelli J.

[1] This is a motion pursuant to subsection 58(1) of the *Tax Court of Canada Rules (General Procedure)* to determine the following two questions as per the Order of Boyle J. dated July 17, 2017:

> (a) Is section 207.05 of the *Income Tax Act* (Canada) unconstitutional for impermissibly infringing on the right to make laws respecting “Property and Civil Rights” which is granted exclusively to the provinces under subsection 92(13) of the *Constitution Act, 1867*?; or
>
> (b) Is section 207.05 of the *Income Tax Act* (Canada) unconstitutional as a consequence of Parliament having improperly delegated the rate-setting element of the charge imposed thereunder to the Minister of National Revenue in contravention of section 53 of the *Constitution Act, 1867*?

[2] I will deal with each question separately and in reverse order to be consistent with the order in which both parties presented argument on these matters during the two-day hearing held thereon, after providing some factual and legislative context for the motion.

[3] There is no dispute between the parties that the Court has jurisdiction to consider the constitutionality of a provision of the *Income Tax Act* (the “*Act*”) on which an assessment is based and vacate assessments if the underlying charging

provision is found to be unconstitutional as per the Federal Court of Appeal decision in *Horseman v Canada*, 2016 FCA 252.

[4] The context of this motion deals with reassessments made by the Minister of National Revenue (the "Minister") with respect to the Appellant's 2010, 2011, 2012 and 2013 taxation years pursuant to section 207.05 of the *Act*, for taxes of $24,833, $14,973, $35,441 and $49,158, respectively, as a result of the advantage he received under such provision in connection with his transfer of private company shares to his Tax Free Savings Account ("TFSA") described below. The factual context is also set out in the Statement of Agreed Facts ("SAF") and the Affidavit of the Appellant filed with the Court on September 11, 2017, which will be referred to from time to time. The transactions that gave rise to the reassessments involved the transfer by the Appellant to his TFSA of common shares in the capital stock of a privately held corporation he purchased after the corporation had effected a freeze reorganization; namely, a reorganization where the existing common shares were exchanged for preference shares having the then fair market value of such existing common shares after which new common shares of low value were issued to the Appellant and others; more particularly described in the pleadings. The Appellant transferred to his TFSA a total of 14,147 of such new common shares in the corporation over the years 2009, 2010, 2011 and 2012 and in 2013 sold his shares pursuant to a Shareholders Agreement requiring him to do so after his retirement at a higher sale price reflecting their then total fair market value of $114,067.26 ($8,063 per share).

[5] With respect to the legislative context, while I will address relevant provisions in more detail during my analysis of the issues, I believe it is important to address the key provisions in dispute here, namely section 207.05 and related provisions such as section 207.01, which contains definitions applicable thereto, as well as section 207.06, which, for purposes of this introduction, may be considered a relieving provision where relief is exercised at the discretion of the Minister, as well as the general overall scheme of the *Act's* treatment of TFSAs.

[6] The Appellant has described the legislative scheme, initially passed by the House of Commons and the Senate and enacted on June 18, 2008 upon receiving royal assent, well in paragraphs 4 to 9 of its submissions, which essentially describe the regime as one where, pursuant to section 146.2 of the *Act,* a taxpayer may contribute up to $5,000 per year to a trust commencing in 2009, which contributions are not deductible from income (unlike RRSP contributions for example) but under which any income or capital gains earned are tax-free under Part 1 of the *Act* unless the TFSA carries on business or holds non-qualified

investments. Withdrawals from TFSAs are not included in tax, logically since the initial contribution is tax paid and since any income earned in the TFSA is exempt from Part 1 tax.

[7] However, Part XI.01, also enacted at the same time, initially only applicable to TFSAs but later adopted with respect to RRSPs and other deferred income schemes, applied new taxes to TFSAs and their holders as a result of over contributions, contributions by non-residents, prohibited and non-qualified investments held by the TFSA and taxes on “advantages” in the nature of benefits emanating from the use of TFSAs, the latter of which is the subject of this particular appeal.

[8] In summary, a regime that contains both an exemption from taxes otherwise payable on income earned in the plan and taxes, some at a very high rate, in fact 100 percent under section 207.05 on annual increases in the value of the plan, where an advantage is given to the holder or through him, purportedly from abuse of misuse of the intended scheme as outlined in particular provisions thereof. The scheme also provides for a relieving provision in section 207.06 which allows the Minister to provide relief from the tax imposed under section 207.05 by way of full or partial waiver or cancellation of that tax.

[9] The relevant provisions read as follows:

> **Tax payable in respect of advantage**
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> **207.05 (1)** A tax is payable under this Part for a calendar year if, in the year, an advantage in relation to a registered plan is extended to, or is received or receivable by, the controlling individual of the registered plan, a trust governed by the registered plan, or any other person who does not deal at arm’s length with the controlling individual.
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> **Amount of tax payable**
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> **(2)** The amount of tax payable in respect of an advantage described in subsection (1) is
>
> > **(a)** in the case of a benefit, the fair market value of the benefit;
> >
> > **(b)** in the case of a loan or an indebtedness, the amount of the loan or indebtedness; and

(c) in the case of a registered plan strip, the amount of the registered plan strip.

Liability for tax

(3) Each controlling individual of a registered plan in connection with which a tax is imposed under subsection (1) is jointly and severally, or solidarily, liable to pay the tax except that, if the advantage is extended by the issuer, carrier or promoter of the registered plan or by a person with whom the issuer, carrier or promoter is not dealing at arm's length, the issuer, carrier or promoter, and not the controlling individual, is liable to pay the tax.

…

[10] An "advantage " is defined in 207.01 as follows:

advantage, in relation to a registered plan, means

(a) any benefit, loan or indebtedness that is conditional in any way on the existence of the registered plan, other than

(i) a benefit derived from the provision of administrative or investment services in respect of the registered plan,

(ii) a loan or an indebtedness (including, in the case of a TFSA, the use of the TFSA as security for a loan or an indebtedness) the terms and conditions of which are terms and conditions that persons dealing at arm's length with each other would have entered into,

(iii) a payment out of or under the registered plan in satisfaction of all or part of a beneficiary's or controlling individual's interest in the registered plan,

(iv) the payment or allocation of any amount to the registered plan by the issuer, carrier or promoter,

(iv.1) an amount paid under or because of the Canada Disability Savings Act, the Canada Education Savings Act or under a designated provincial program, and

(v) a benefit provided under an incentive program that is — in a normal commercial or investment context in which parties deal with each other at arm's length and act prudently, knowledgeably and willingly —

offered to a broad class of persons, if it is reasonable to conclude that none of the main purposes of the program is to enable a person or partnership to benefit from the exemption from tax under Part I of any amount in respect of the plan;

(b) a benefit that is an increase in the total fair market value of the property held in connection with the registered plan if it is reasonable to consider, having regard to all the circumstances, that the increase is attributable, directly or indirectly, to

(i) a transaction or event or a series of transactions or events that

(A) would not have occurred in a normal commercial or investment context in which parties deal with each other at arm's length and act prudently, knowledgeably and willingly, and

(B) had as one of its main purposes to enable a person or a partnership to benefit from the exemption from tax under Part I of any amount in respect of the registered plan,

(ii) a payment received as, on account or in lieu of, or in satisfaction of, a payment

(A) for services provided by a person who is, or who does not deal at arm's length with, the controlling individual of the registered plan, or

(B) of interest, of a dividend, of rent, of a royalty or of any other return on investment, or of proceeds of disposition, in respect of property (other than property held in connection with the registered plan) held by a person who is, or who does not deal at arm's length with, the controlling individual of the registered plan,

(iii) a swap transaction, or

(iv) specified non-qualified investment income that has not been paid from the registered plan to its controlling individual within 90 days of receipt by the controlling individual of a notice issued by the Minister under subsection 207.06(4);

(c) a benefit that is income (determined without reference to paragraph 82(1)(b)), or a capital gain, that is reasonably attributable, directly or indirectly, to

(i) a prohibited investment in respect of the registered plan or any other registered plan of the controlling individual,

(ii) in the case of a registered plan that is not a TFSA, an amount received by the controlling individual of the registered plan, or by a person who does not deal at arm's length with the controlling individual (if it is reasonable to consider, having regard to all the circumstances, that the amount was paid in relation to, or would not have been paid but for, property held in connection with the registered plan) and the amount was paid as, on account or in lieu of, or in satisfaction of, a payment

(A) for services provided by a person who is, or who does not deal at arm's length with, the controlling individual of the registered plan, or

(B) of interest, of a dividend, of rent, of a royalty or of any other return on investment, or of proceeds of disposition, or

(iii) a deliberate over-contribution;

(d) a registered plan strip in respect of the registered plan; and

(e) a prescribed benefit. (avantage)

Waiver of tax payable

207.06 (1) If an individual would otherwise be liable to pay a tax under this Part because of section 207.02 or 207.03, the Minister may waive or cancel all or part of the liability if

(a) the individual establishes to the satisfaction of the Minister that the liability arose as a consequence of a reasonable error; and

(b) one or more distributions are made without delay under a TFSA of which the individual is the holder, the total amount of which is not less than the total of

(i) the amount in respect of which the individual would otherwise be liable to pay the tax, and

(ii) income (including a capital gain) that is reasonably attributable, directly or indirectly, to the amount described in subparagraph (i).

Waiver of tax payable

(2) If a person would otherwise be liable to pay a tax under this Part because of subsection 207.04(1) or section 207.05, the Minister may waive or cancel all or part of the liability where the Minister considers it just and equitable to do so having regard to all the circumstances, including

(a) whether the tax arose as a consequence of reasonable error;

(b) the extent to which the transaction or series of transactions that gave rise to the tax also gave rise to another tax under this Act; and

(c) the extent to which payments have been made from the person's registered plan.

(3) [Repealed, 2013, c. 40, s. 77]

Other powers of Minister

(4) The Minister may notify the controlling individual of a registered plan that the controlling individual must cause a payment to be made from the registered plan to the controlling individual within 90 days of receipt of the notice, the amount of which is not less than the amount of specified non-qualified investment income in respect of the registered plan.

[11] I will now turn to addressing whether section 207.05 is unconstitutional, first, for violating section 53 of the *Constitution Act, 1867* (the "*Constitution*") and then whether it infringes on the provincial power of making laws respecting "Property and Civil Rights" pursuant to subsection 92(13) thereof.

A. Section 53 Issue

[12] Section 53 of the *Constitutio*n reads as follows:

Appropriation and Tax Bills

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

[13] There is no dispute between the parties that section 53 provides that Parliament alone has the power to impose a tax, enshrining the fundamental

democratic principal of "no taxation without representation", affirmed in various Supreme Court of Canada decisions, including *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134, at paragraph 19 and *620 Connaught Ltd. v Canada (Attorney General)*, [2008] 1 SCR 131, 2008 SCC 7.

[14] There is also no real dispute between the parties that clear and express language must be used to delegate taxing power to comply with such principle of no taxation without representation as enunciated in *Ontario English Catholic Teachers' Assn. v Ontario (Attorney General)*, [2001] 1 SCR 470, 2001 SCC 15 ("*OECTA*"), relying on *Eurig Estate (Re)*, [1998] 2 SCR 565 and followed by *Confédération des syndicats nationaux v Canada (Attorney General)*, [2008] 3 SCR 511, 2008 SCC 68. The Supreme Court of Canada expressed this principle at paragraphs 74 and 77 of *OECTA*:

> 74. The delegation of the imposition of a tax is constitutional if express and unambiguous language is used in making the delegation. The animating principle is that only the legislature can impose a new tax *ab initio*. But if the legislature expressly and clearly authorizes the imposition of a tax by a delegated body or individual, then the requirements of the principle of "no taxation without representation" will be met. In such a situation, the delegated authority is not being used to impose a completely new tax, but only to impose a tax that has been approved by the legislature.…
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> …
>
> 77. There is long-standing authority for the view that the test for constitutional delegation of the taxation power is the use of clear and unambiguous language.…

[15] Notwithstanding these general principles of law enunciated by the Supreme Court, the parties take opposite positions.

[16] The position of the Appellant is that sections 207.05 and 207.06 must be read together rendering section 207.05 unconstitutional on the basis that Parliament has implicitly or indirectly delegated authority to the Minister and ultimately her unelected sub-delegates to set the rate of taxation using unclear and ambiguous language and which exceeds mere details and mechanisms. In short, the existence of the discretionary relieving provision of section 207.06 following 207.05 gives the Minister the discretion to set the tax rate from anywhere between 0 and 100 percent thus amounting to an implied delegation of the right to set the tax rate.

[17] As evidence of such position, the Appellant argues that the principles of statutory interpretation, the limited guidance as to the purpose of the "advantage rules" and the manner in which 207.05 is administered by the Canada Revenue Agency ("CRA") all support its contention that the provisions of 207.05 and 207.06 are conjoined provisions; i.e., provisions that do not stand alone but must be read together, implicitly resulting in the giving of the power to set the tax rate on advantages to the Minister.

[18] The Respondent argues that each of sections 207.05 and 207.06 are independent and stand-alone provisions, one a charging provision and the other a relieving provision, pursuant to the rules of statutory interpretation; that the intention of Parliament to treat section 207.05 as an anti-avoidance rule designed to prevent specified transactions considered a misuse or abuse of the TFSA exemption has been clear and unequivocal since inception and that the manner in which the Minister executes its discretion to waive or cancel the tax imposed by section 207.05 is not a basis for declaring it unconstitutional; and accordingly, there had been no delegation of any taxing authority, expressly or implicitly.

[19] Before commencing my analysis of the parties' relevant positions, it should be noted that the Appellant does not argue that section 207.06 is unconstitutional nor claim such position in this motion. In fact, counsel for the Appellant acknowledged in argument before me that it is constitutional. However, he argues, that since it must be read together with 207.05, it essentially makes 207.05 unconstitutional by allowing the Minister to effectively set the rate of taxation.

[20] There is also no argument between the parties that, as per *OECTA* the Supreme Court of Canada opined that the three defining features of a tax are the tax base, the time unit and the tax rate at paragraph 73 where the Court stated:

> … I agree with the Ontario Court of Appeal that a tax is not imposed until the rate is set. Along with the tax base and time unit, the tax rate is a defining feature of a tax. This must be the case, for if the rate is zero, there is no tax. As the Court of Appeal stated, at p.41:
>
> > ... an element, or component, of the exercise of the power to tax is the establishment of the amount, or rate, of the tax, not only to enable the taxpayer to know the extent of his or her obligation, but to enable the taxing authority to determine the anticipated amount of tax revenue it will obtain….

[21] The Appellant concedes that the tax base and the time unit are elements which have been set out in section 207.05 through the definition of advantage and the annual triggering of the purported tax. The Appellant argues only that the tax rate was not set by Parliament but is determined by the Minister alone resulting in a delegation of tax authority to the Minister.

[22] Frankly, I do not agree with the Appellant or any of its reasons in support of its position.

[23] Firstly, the Appellant argues that the principle of statutory interpretation that must be applied is that of the textual, contextual and purposive approach enunciated by the Supreme Court of Canada in *Canada Trustco Mortgage Co. v Canada*, [2005] 2 SCR 601, 2005 SCC 54 ("*Canada Trustco*") at paragraphs 10 and 11:

> 10 … The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[24] The Appellant relies on the above to essentially default to its position that 207.05 does not stand alone but forms part of a broader scheme (i.e., the advantage rules) and thus other provisions within that scheme are relevant to analysing the constitutionality of section 207.05 as it states in paragraph 34 of its submissions. The Appellant relied on *Reference re Goods and Services Tax*, [1992] 2 SCR 445, suggesting it stands for the principal that two provisions or sets of provisions can be considered together in the constitutional analysis to support its position. That case, however, involved a question of the division of powers between the Federal and Provincial levels of Government where the Supreme Court of Canada considered the ITC and collection provisions of the legislation as part of the analysis and decided that the legislation was in "pith and substance" taxation and that the collection provisions were necessarily incidental to Parliament's power over taxation notwithstanding any intrusion into provincial jurisdiction over property and civil rights. The principle was not used in the context of analysing a section 53 determination and, accordingly, is distinguishable at this stage.

[25] With respect to the Appellant, the Supreme Court of Canada has made clear in many decisions following *Canada Trustco*, that the contextual and purposive approach step is only necessary where the words of a provision are capable of more than one meaning, something *Canada Trustco* itself alludes to above. In *Placer Dome Canada Ltd. v Ontario (Minister of Finance)*, [2006] 1 SCR 715, 2006 SCC 20, LeBel J. stated in paragraph 21:

> … Taxpayers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs. Where the words of a statute are precise and unequivocal, those words will play a dominant role in the interpretative process.

[26] And at paragraph 23 added:

> The interpretive approach is thus informed by the level of precision and clarity with which a taxing provision is drafted. Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied. Reference to the purpose of the provision "cannot be used to create an unexpressed exception to clear language"… Thus, legislative purpose may not be used to supplant clear statutory language, but to arrive at the most plausible interpretation of an ambiguous statutory provision.

[27] Iacobucci J. has clearly enunciated the principle that only if the words are ambiguous should the Court depart from their plain meaning and engage in the contextual and purposive approach in Supreme Court of Canada decisions including *Canderel Ltd. v Canada*, [1998] 1 SCR 147, at paragraph 41, *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 SCR 411, at paragraph 112 and *Canada v Antosko*, [1994] 2 SCR 312, at paragraph 328.

[28] I agree with the Respondent that the words of both 207.05 and 207.06 are clear and that each represents a separate stand-alone provision, the first a detailed provision that sets a tax rate of 100 percent on the advantages it clearly defines in 207.01, in regard to detailed transactions it clearly sees as misusing or abusing the TFSA tax exemption regime, with detailed and specific exceptions and, the second, a discretionary ability of the Minister to waive or cancel all or any portion of such 100 percent tax. Section 207.05 makes no reference to being subject to 207.06 to suggest they must be read together and section 207.06 clearly contemplates the 100 percent tax has already been assessed in the first line thereof:

> **207.06(2)** If a person would otherwise by liable to pay a tax under this Part because of subsection 207.04(1) or section 207.05, the Minister may waive or cancel…

[29] It is clear in subsection 207.06(2) that the waiver regime is only activated once the tax liability to the taxpayer is established. Without this provision, there could be no relief from the 100 percent tax rate imposed on “advantages”.

[30] Looking at the provisions themselves, section 207.05 is clearly a charging provision. Subsection (1) imposes liability for the tax while subsection (2) thereof establishes the amount of tax payable. The rate of tax is established by subsection 207.05(2) in respect of an “advantage” as defined in subsection 207.01(1) as 100 percent of the benefit or 100 percent of the subject loan or indebtedness. The Appellant himself, in its written submissions, state that section 207.05 imposes a tax that is equal to 100 percent of the increase in fair market value of the property held in connection with the TFSA and that paragraph 207.05(2)(a) sets the amount of tax payable so any argument of insufficient detail in establishing the rate is without merit. There is no wording in 207.05 that purports to delegate this rate setting ability which the Appellant acknowledges is set to 100 percent.

[31] Looking at the detail of section 207.05, it is clear that a tax is only payable if an advantage is in relation to a registered plan (TFSA here) and is extended to the plan holder, the trust governed by the plan or persons who do not deal at arm’s length to the holder; in essence conditions precedent to the triggering of the tax.

[32] The definition of “advantage “ in 207.01 is very detailed and addresses the transactions that give rise to advantages in paragraphs (a) to (e). In paragraph (a), the advantage means any benefit, loan or indebtedness that is conditional in any way on the existence of such plan, then sets out 5 exceptions which include an exception for a loan made under arm’s length terms and conditions. In paragraph (b), the advantage means the benefit that is the increase in the total fair market value of the property held in the plan but requires that it must be reasonable to consider, having regard to all the circumstances, that the increase is attributable to 4 types of transactions or series of transactions or payments, that generally deals with non-arm’s length transactions or transactions that result in shifts in value into a TFSA as a means of avoiding tax. Paragraph (c) includes, *inter alia*, a benefit that is income or capital gains reasonably attributable, directly or indirectly, to a prohibited investment or deliberate over-contributions as defined and so forth, including paragraph (e) which includes prescribed benefits, allowing cabinet to essentially prescribe further offensive transactions.

[33] It is clear from the plain but detailed provisions of section 207.05 that Parliament made great effort to considerations of the inclusions, exceptions, conditions precedent and types of transactions it wanted to capture and make

subject to this onerous tax, over several years of amendments as later discussed. Hardly the vague approach the Appellant suggests.

[34] Section 207.06, on the other hand, speaks only of waiving or cancelling the tax created by 207.05, provides the Minister with broad discretion to waive or cancel all or any portion thereof but requires the Minister, in its consideration of all circumstances, to address three specific circumstances; including whether the tax arose as a consequence of a reasonable error, the extent to which the transaction or series of transactions that gave rise to the tax also gave rise to another tax under the *Act* and the extent to which payments have been made from the plan. In this regard, I disagree with the Appellant who suggests the considerations of those three criteria are directive only. The provision states that the Minister include their consideration, not “may include”, and so they are mandatory considerations.

[35] There is nothing in these provisions that speak to anything other than waiver or cancellation of preordained taxes under 207.04 or 207.05.

[36] Consequently, it is clear to me that there is no justification for the Appellant’s position that the two sections must necessarily be conflated, be read together, to conclude the plain meaning of the words amounts to an implicit delegation of taxing authority to the Minister. To do so would require me to read wording into those provisions that does not presently exist contrary to the admonishment of Lamer C.J. in *R. v McIntosh*, [1995] 1 SCR 686, where he wrote that the contextual approach to statutory interpretation “does not generally mandate the courts to read words into a statutory provision” and that “it is only when words are “reasonably capable of bearing” a particular meaning that they be interpreted contextually.” Likewise, it is clear the tax rate of 100 percent is fixed by the plain wording of section 207.05 and the definition of advantage in 207.01.

[37] It should be noted that the Appellant’s reliance of *Eurig Estate (Re)* and the *Confédération des syndicats nationaux* decisions of the Supreme Court of Canada above referenced in support of its position is misplaced. In both those cases, the Supreme Court used the principles above enunciated to find that the characterization of probate fees and employment insurance premiums used by the legislatures in those cases were incorrect, instead finding they were taxing provisions that were not authorized by Parliament and thus could not be delegated. The case at hand has no re-characterization issues. We are dealing with a tax *ab initio* and so apart from general principles of the need to use clear language, those case are distinguishable. With respect to those clear language principles however, I find that there is clearly no delegation of authority in the language in issue.

[38] It is also clear that the two provisions follow separate appeal and administrative regimes. If a taxpayer disputes there is an "advantage" that is taxed under 207.05, he may appeal his reassessment to this Court. If on the other hand he disagrees with the exercise of the Minister's discretion or failure to exercise such discretion, he may appeal same to the Federal Court, as the Appellant did here, who must review same on the standard of reasonableness. Frankly, I query which Court would have the right to hear an entire appeal if I accepted the Appellant's contention that they are in effect part and parcel of the same provision.

[39] I also give no weight to the Appellant's contention that because 207.06 follows 207.05, one after the other, that such is proof the two were intended to be read in conjunction. As can be seen from the provisions of 207.06(2) quoted just above, 207.06 also applies to 207.04(1) which taxes the holder of a TFSA a 50 percent tax on the value of any prohibited or non-qualified investment held therein on an annual basis. While close, they don't follow one another and the fact 207.06 is a relieving provision for different sections that impose different tax rates supports its stand-alone quality as a true relieving provision. Frankly, placing relieving provisions in close proximity to the provisions they intended to grant relief from is both a more efficient and transparent manner in bringing such relief provisions to the taxpayers attention; thus facilitating his ability to seek such relief. I do not see that any mal intention or hidden agenda should be attributed to the Minister for doing same.

[40] Moreover, the fact the Minister may choose on its own to grant relief and reflect same in the same reassessment if she chooses, or wait until the taxpayer appeals to the Federal Court to cancel tax under section 207.06, is no different than the Minister exercising its discretion to waive interest or penalties before application by the taxpayer for relief, or after, under subsection 220(3.1) of the *Act*. Each of those provisions allow the Minister to do just that, at her own discretion, and, as a practical matter, it seems the Minister should not be criticized for exercising its given discretion in ways it considers efficient.

[41] The Appellant cites the Supreme Court of Canada decision in *Nowegijick v The Queen*, [1983] 1 SCR 29, for the proposition that the administrative policy and interpretation of a provision by the Minister is a factor to consider in the interpretation of a legislative provision and at paragraph 37 the Court stated:

> Administrative policy and interpretation are not determinative but are entitled to weight and can be an "important factor" in case of doubt about the meaning of legislation….

[42] I however agree with the Respondent that such a principle is not applicable to a case like the present where the meaning of section 207.05 as a taxing provision is clear and the meaning of section 207.06 as a relief mechanism is equally clear. There is no ambiguity about the meaning of these provisions in my mind.

[43] As I will also discuss shortly, there is no need to turn to the administrative practice of the CRA to determine the intent of these provisions as being anti-avoidance provisions to ensure the integrity of the TFSA regime. Unlike in *Saumur v Quebec*, [1953] 2 SCR 299, where the Court had to consider whether a municipal by-law that required the Chief of Police's prior written approval before distribution of literature on the streets fell within provincial jurisdiction or was *ultra vires* the province as being in relation to free speech or religion, the Court considered the manner in which the Chief of Police decided whether the contents of literature to be distributed on the streets were objectionable; namely, by reading it and deciding in his own opinion without guidance, if it was objectionable. The Court found the Chief of Police used the by-law as a vehicle of censorship.

[44] In the case at hand, there is no need to look to the conduct for the intent of the provisions in question. They are both clear as stated and as earlier opined, should be given their ordinary meaning, which is also evidenced by the clearly stated policy of the legislation which I dealt with above. However, I do wish to address the argument of the Appellant that the administrative acts of the CRA suggests that the CRA's policy was to treat itself as the taxing authority to set the rate of tax applicable to the advantages received. The Appellant points to advices in letters sent to the Appellant that propose and later confirm the 100 percent tax but which refer to the Minister's ability to waive or cancel all or any portion of such tax and invite representations on same as evidence that it was intended these provisions must be read together. In addition, the Appellant points to the decision letter of one Mr. W., the CRA officer who decided to exercise the discretion to impose a tax at the highest marginal combined Federal/Provincial rate instead of 100 percent, after the Appellant appealed to the Federal Court and such Court ordered the Minister to consider exercising such discretion. In the schedule to such decision letter reducing the tax as aforesaid, Mr. W. stated:

> …In other cases, we have waived a portion of the advantage tax. Instead of imposing the 100% tax, we imposed a tax at the taxpayer's top marginal rate that varies between 39% and 50% depending on the taxpayer' [sic] provincial residence on a taxation year basis. This option is what is being considered in all cases where the Advantage Tax has been assessed on abusive transactions that occurred before October 17, 2009….

> …
>
> Our recommendation is one that has been made (and continues to be made) in cases where the Advantage Tax has been assessed on abusive transactions that occurred before October 17, 2009.

[45] The fact the CRA would point out its ability to waive or cancel penalties and invite representations is, in my view, an appropriate courtesy to the taxpayer and a transparent acknowledgment indicating it has such power. There is nothing in such boiler plate to suggest the taxpayer will be successful or not. The Minister must still consider all the circumstances including the three criteria he is mandated to consider in subsection 207.06(2) earlier discussed to discharge his discretionary duty.

[46] As for Mr. W.'s decision in this matter in favour of the Appellant, while I appreciate Mr. W. indicated "In other cases, we have waived a portion of the advantage tax" and "imposed a tax at the taxpayer's top marginal tax rate" in those cases, he says neither that this is the CRA's policy nor that it is done in all cases. At most, he states "This option is what is being considered [emphasis mine] in all cases where the Advantage Tax has been assessed on abusive transactions that occurred before October 17, 2009". Again, he points to an option the CRA considers in such abusive transactions that occurred before that date. There is no evidence the CRA must consider that option, what it does or does not do for abusive transactions that occurred after that date, nor evidence of any commitment to give all taxpayers the same treatment. This is evident in the case at hand where the Minister did not initially exercise such discretion, confirming the 100 percent rate reassessment, and only did so after appeal to the Federal Court by the Appellant.

[47] Considering the option is not the same as committing to exercising the option in all circumstances. The **Appellant** has brought no proof of any fixed CRA policy or pointed to any policy statement, circular or bulletin that would support his contention.

[48] Frankly, even if the CRA had gone on record as accepting the suggested practice as policy, I fail to understand why adopting a policy or guidelines on the exercise of its discretionary powers, providing it does not limit such powers in contravention of the provision, would be offensive. I would think that informing the public of any such policy or guidelines would only assist the taxpayer in making his representations for relief. The **Appellant** resorts to mere speculation as

to the Minister's intent or state of mind from the inferences it draws from this limited evidence.

[49] The Appellant himself admits in paragraph 150 of its admissions, albeit in the context of addressing the other constitutional issue pertaining to subsection 92(13) of the *Constitution*, that:

> …The fact that the Minister has adopted this practice does not change the characterization of section 207.05 discussed above. The Minister's practice is not law,…

[50] Although he goes on to suggest the Minister is the one setting the rate, the Appellant's inconsistencies and the inferences it draws throughout its submissions are often irreconcilable.

[51] The Appellant admitted that the *Act* contains many instances where a relieving provision follows a taxing provision or is in close proximity to same. Examples of these provisions include subsection **207.06(1)** which is a waiver provision of taxes payable on excess contributions to a TFSA account (1 percent per month) under subsection **207.01** and for tax payable on non-resident contributions to a TFSA account (1 percent per month) under section 207.03; subsection 207.8(3) which is a waiver for tax payable for excess contributions to an Employee Profit Sharing Plan (up to the highest combined marginal tax rate in the taxpayers province) or even subsection 207.06(2) itself which also acts as a waiver for tax payable on prohibited or non-qualified investments in a TFSA (50 percent of the offending property's value each year), but argues section 207.05 is different, an exception rather than the rule or norm as he stated in argument, because of the level of tax it imposes at 100 percent. While it is true some of the said provisions tax at a rate of 1 percent per month on the value of the offending amount, others tax at 50 percent or the highest provincial marginal tax rate and the provision in issue here at 100 percent, the Appellant has provided no evidence that any of these higher rates is offensive to the overall policy of our *Act*. I take judicial notice of the fact and submit it is trite knowledge that in our past the highest marginal tax rate of Part 1 taxes have exceeded 90 percent as they have in other jurisdictions, including the UK. The rate of taxation is and always will be the prerogative of Parliament and it is not for this Court to question its ability to set whatever rate of taxation it desires. Citizens can vote out governments who they feel overtaxes them unfairly in the exercise of their democratic rights.

[52] I agree with the Respondent that the Appellant, in argument, clearly takes issue with the justness or reasonableness of the advantage tax under 207.05. In its submissions, particularly paragraphs 54 and 67 thereof, the Appellant has referred to the 100 percent tax as “absurd”, “contrary to accepted norms of justice or reasonableness” and a “harsh imposition” that he suggests later overreach in meeting the provisions’ aims. On the one hand, the Appellant implicitly recognizes the aims of the provision, being an anti-avoidance aim to prevent the misuse or abuse of the TFSA tax exemption regime, something he also argues is vague at times, but then accuses Parliament of overreaching on meeting its aim and thus challenges the underlying efficacy of the provisions. With respect to the Appellant, regardless of how harsh or draconian he or anyone else may consider the 100 percent tax, I agree with the Respondent that such concerns are not an appropriate basis for challenging the constitutionality of a provision or provisions that are unambiguous. The efficacy of the provision is not for the Court to interfere with. As Charon J. held in *Canada (Information Commissioner) v Canada (Minister of National Defence)*, [2011] 2 SCR 306, 2011 SCC 25, at paragraph 40:

> …The Court cannot disregard the actual words chosen by Parliament and rewrite the legislation to accord with its own view of how the legislative purpose could be better promoted.

[53] The fact that Parliament has decided different tax rates apply to different transactions or plans, or that criteria in waiver provisions differ, or even that some of these anti-avoidance provisions give the taxpayer opportunity to correct an error before year-end while others like 207.06 do not, (although it would no doubt be a circumstance to take into consideration in exercising ministerial relief thereunder), do not form the bases of constitutional invalidity. Parliament has decided that for different benefits, it will have a different set of terms and conditions and it is not for this Court to second guess the will or reasoning of Parliament solely based on these differences.

[54] Finally, while I agree that the provisions are unambiguous and thus there is no need to undertake an analysis of the purpose or intent of the legislation in question, I should like to address the Appellant’s contention that there is only limited guidance as to the intent of the legislation being impugned in paragraph 81 of its submissions where he states “The opaque purpose behind the *advantage* rules further supports the Appellant’s position that taxing authority has been delegated to the Minister.”

[55] The Appellant's above position is best explained by referencing its submissions found in paragraphs 64 and 65:

> 64. Without a clear and defined purpose behind the *advantage* rules, there is even less involvement from Parliament in determining the appropriate tax consequences. There is greater discretion given to the Minister, and a less robust statutory framework to guide the Minister's hand. She is left entirely free to set the rate at whatever she (or her CRA delegates) sees fit, without constraint and with only limited guidance.
>
> 65. In other words, the Minister is not merely implementing Parliament's will or intent in setting the tax rate in any given situation. Without an explicit elucidation of the purpose underlying the *advantage* rules, the Minister is acting on her own accord without regard to Parliament's specific objectives (if any).

[56] In fact, the Appellant suggested in argument that the first real public announcement of the purpose of the provisions was not until a June 2011 Action Plan.

[57] Frankly, I find the Appellant's position totally unsupportable by both the evidence of public statements throughout the legislative process including amendments to the provisions and their extension to other registered plans, as well as the fact the purpose of the legislation screams out at the reader from the provisions alone.

[58] As earlier discussed, **Parliament** has expended great effort in creating the provisions in question and the related definitional sections defining "advantage" to create what is basically a detailed list of transactions or investments that will be considered advantages, with specific exceptions therefrom, that will be taxed at an effective 100 percent rate. In other words, if you do these things, you will pay a tax equal to 100 percent of the increase in value of the plan. If this approach does not scream an anti-avoidance purpose to protect the integrity of the TFSA scheme that otherwise does not tax income growth within the plan, I don't know what does.

[59] Moreover, Bill C-50, an Act to implement certain provisions of the February 26, 2008 Budget contained the first version of section 207.05 creating the 100 percent advantage tax, thus it was clear an anti-avoidance element was present from inception. Although there was no specific reference to the 100 percent advantage tax in the actual 2008 Budget plan dated February 26, 2008, there was clear warning of a future anti-avoidance provision on page 74 thereof:

> To address certain concerns that arise from the special treatment of a TFSA, Budget 2008 proposes some limitations on TFSA investments.

[60] Subsequent Budgets enhanced the definition of "advantage" and there is ample evidence of continued avoidance transaction concerns from inception to the present evidenced in various Technical Notes, Press Releases and Tax Measures announcements.

[61] The Technical Notes dated February of 2009, in addition to carving out exceptions, included a transaction or event (or series of transactions or events) that did not reflect commercial terms and a main purpose of which was to enable a holder or other party to benefit from the tax exempt status of a TFSA and stated:

> This provision is intended to guard against transactions designed to artificially shift taxable income away from the holder and into the shelter of a TFSA or to circumvent the TFSA contribution limits. [Exactly what the Appellant is accused of doing in the matter at hand]

[62] In a Press Release of the Minister dated October 16, 2009, titled "Government of Canada Proposes Technical Changes Concerning Tax-Free Savings Accounts", the Minister talked of proposed amendments that would, *inter alia*, "Effectively prohibit asset transfer transactions between TFSAs and other accounts" and stated:

> These proposals will ensure that the TFSA remains viable and strong for Canadians today and in the future and the use of inappropriate transactions to draw excessive benefits are avoided.

[63] As a result, the September 28, 2010 Technical Notes added to the definition of advantage specific transactions like "swap transactions" and deliberate over-contributions to the list of abusive transactions.

[64] The October, 2011 Technical Notes announced further amendments to the definition of advantage effectively extending their application to RRSPs and RRIFs.

[65] Tax Measures: Supplementary Information table in the House of Commons by the Minister on March 22, 2017 proposed to extend the anti-avoidance rules applicable to TFSAs and other tax-assisted registered plans to Registered Education Savings Plans and Registered Disability Savings Plan "to help ensure

that the plans do not provide excessive tax advantages unrelated to their respective basic objectives. (See Respondent's Book of Authorities, Volume 3, Tab 43, at page 17)

[66] The Minister himself referenced the anti-avoidance purpose in the decision of Mr. W., above referred to, that provided the relief to the Appellant under subsection 207.06(2) earlier quoted:

> Our recommendation is one that has been made (and continues to be made) in cases where the Advantage Tax has been assessed on abusive transactions that occurred before October 17, 2009.

[67] As the Respondent has pointed out, even the Appellant recognized the anti-avoidance purpose of the provisions in correspondence of its counsel to the CRA dated July 16, 2015 and referenced as Exhibit A to the Affidavit of Thomas Hunt, filed in support of this motion, where he stated in his argument for waiver, at page 4:

> …I am aware of several other TFSA cases which I would characterize as giving rise to "blatant" advantages, for example through the intentional mispricing of securities swapped into or out of a TFSA….

[68] In the Appellant's submissions from paragraph 137 to 145, the Appellant analyzes the TFSA scheme including references to the purpose thereof by including references to the Minister's Technical Notes and Press Releases above referred to and acknowledges the purpose of section 207.05 at paragraph 144:

> 144. Thus, it appears that the stated purpose of section 207.05 is predominantly to maintain the integrity of the TFSA scheme and target taxpayers who undertake "inappropriate" transactions.

[69] It seems the Appellant has no problem identifying the purpose of the legislation in determining the pith and substance of the provisions, but oddly finds them vague with respect to his section 53 arguments.

[70] The purpose of the impugned provisions is clear and only reinforces the plain meaning of the provisions as earlier discussed.

[71] In conclusion, for the reasons set out above, I find that the provisions of section 207.05 do not violate section 53 of the *Constitution*. The clear language of

both 207.05 and 207.06 do not support the Appellant's view that the two must be read together so as to result in an implicit delegation of the authority to set the tax rate. The provisions are clear, were properly passed by Parliament into law, having been amended and extended through several Budgets since the date of inception, and are constitutionally valid in this regard.

[72] It should be noted that the parties referred to other doctrines of statutory interpretation such as the presumptions of legislative knowledge, competence and perfection, the presumption of consistent expression and the presumption against an absurd result, further detailed in the Respondent's brief of submissions from paragraph 52 to 63, some of which have actually been addressed in the context of earlier analysis above. Having found the clear language of the provisions supports the Respondent's position it is not necessary for me to address these doctrines further in detail, other than to add that they generally support the Respondent's position as well; particularly having regard to the detail in which Parliament addressed the various types of offending transactions and exceptions, condition precedent and terms contained therein evidencing it applied its mind to choose the wording of these provisions that are consistent with its stated intention, which suggests Parliament knew exactly what it was doing.

B. Issue of Infringement of Subsection 92(13) of the *Constitution*

[73] The second issue to be decided in this Motion is whether section 207.05 infringes upon the right of provincial legislatures to legislate in relation to "Property and Civil Rights" under subsection 92(13) of the *Constitution*.

[74] Subsection 92(13) of the *Constitution* grants the provincial legislatures the exclusive rights to make laws in relation to property and civil rights in the province:

> **92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,…
>
> 13. Property and Civil Rights in the Province.

[75] Subsection 91(3) of the *Constitution* grants the Parliament of Canada the exclusive right to make laws in relation to taxation:

> **91**. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> …
>
> 3. The raising of Money by any Mode or System of Taxation.

[76] In essence, the Appellant argues that section 207.05, in pith and substance, falls within the provincial jurisdiction of property and civil rights under subsection 92(13) of the *Constitution* and is not saved by the ancillary powers doctrine on the basis the 100 percent tax rate is a confiscation of property and is not necessary to the effective exercise of the Federal taxation power as it overreaches or goes beyond what is necessary to meet the aims of the Federal section.

[77] The Respondent's position is that the section is in pith and substance taxation within Parliament's competence under subsection 91(3) of the *Constitution* and is *intra vires* notwithstanding any incidental effects it may have on property and civil rights.

[78] Although the parties have differing approaches to their analysis, there is essentially agreement that the constitutionality of legislation in relation to the division of powers begins with an analysis of the "pith and substance" of the impugned legislation, whether it concerns a whole or part of that legislation. In *Canadian Western Bank v Alberta*, [2007] 2 SCR 3, 2007 SCC 22, the Supreme Court of Canada affirmed the longstanding pith and substance analysis at paragraph 25:

> It is now well established that the resolution of a case involving the constitutionality of legislation in relation to the division of powers **<u>must always begin with an analysis of the "pith and substance"</u>** of the impugned legislation…. **<u>The analysis may concern the legislation as a whole or only certain of its provisions.</u>** [Emphasis mine and the Respondent's in its submissions at paragraph 41]

> This initial analysis consists of an inquiry into the true nature of the law in question for the purpose of identifying the "matter" to which it essentially relates.
>
> …
>
> If the pith and substance of the impugned legislation can be related to a matter that falls within the jurisdiction of the legislature that enacted it, the courts will declare it *intra vires*. If, however, the legislation can more properly be said to relate to a matter that is outside the jurisdiction of that legislature, it will be held to be invalid owing to this violation of the division of powers.
>
> To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body and the legal effect of the law (*Reference re Firearms Act*, at para. 16). To assess the purpose, the courts may consider both intrinsic evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary debates. In so doing, they must nevertheless seek to ascertain the true purpose of the legislation, as opposed to its mere stated or apparent purpose…. may take into account the effects of the legislation….

[79] In determining the pith and substance of section 207.05, I am presented with essentially two different arguments of the Appellant; the first that the effect of the 100 percent tax on the increase in fair market value of the TFSA constitutes a confiscation of property and thus its purpose is predominantly within the provincial sphere of property and civil rights; the second that section 207.05 is not properly characterized as a revenue raising measure and hence its purpose is not predominantly taxation.

[80] I see no merit in the first argument of the Appellant. The Appellant has provided no legal basis for its position by way of precedent nor even a definition of what it considers "confiscation". The fact is that there is nothing in the impugned section that speaks of taking title or seizing or confiscating the TFSA, any investment in it, any initial contribution or anything for that matter. The workings of the section with respect to the reassessments in issue impose a tax equal to an increase in the fair market value of the TFSA to the holder, payable, as with any other tax under the *Act*, by the taxpayer in funds. There is no wording that requires the TFSA to be wound up to pay for such tax liability, transferred to Her Majesty in satisfaction of that liability or in any way speaks to requiring any of same to any of the investments held therein.

[81] The Appellant himself implicitly acknowledges same by suggesting the tax can be realized against any property of the taxpayer in subparagraph 146 c. of its submissions, although improperly assumes such realization is the result of such provision itself.

[82] Moreover, considering the very limited scope of this tax, to only holders of TFSAs that engage in very specific transactions caught by 207.05, it is clear that there is no attempt to regulate any class of property or any industry related to property and so does not have as its main purpose the regulation of property. The provision does not even prevent a TFSA plan from owning any type of property, just provides a tax penalty for certain holdings within the plan. This situation is unlike the cases where the Supreme Court of Canada found one level of Government was attempting to regulate an industry within the jurisdiction of another level of Government under the guise of something within their jurisdiction as in *Reference Re Alberta Statutes - The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] SCR 100 [province found trying to regulate banking under the guise of imposing indirect provincial taxation] or *Quebec (Attorney General) v Lacombe*, [2010] 2 SCR 453, 2010 SCC 38 [province trying to regulate aeronautics under guise of municipal zoning] or *MacDonald et al. v Vapor Canada Ltd.*, [1997] 2 SCR 134 [Federal Government trying to regulate property and civil rights under guise of criminal law].

[83] While I have no doubt that many citizens might, in the general sense, consider the payment of any tax as a confiscation of their hard earned income, particularly if subject to a high level of taxation, this does not translate to the taxing provision creating a right of confiscation. The Appellant seems to share this concern as stated in paragraph 149 of its submissions:

> 149. ….The severe result of the tax confirms that the provision has a confiscatory element that is intended to have an effect larger than merely raising money for the federal government….

[84] The effect of the provision itself does not create rights of confiscation or seizure, ownership or regulate the purchase and sale of any property.

[85] The Appellant, in my opinion, wrongly conflates the severity or high rate of taxation with legal confiscation or seizure. The relevance of the efficacy of a provision discussed in *Reference Re Firearms Act*, at paragraph 31 above was also confirmed in *Ward v Canada (Attorney General)*, [2002] 1 SCR 569, 2002 SCC

17, at paragraph 26, "…The purpose of legislation cannot be challenged by proposing an alternate, allegedly better, method for achieving that purpose."

[86] While it cannot be denied that the tax liability created by the provision has the effect of requiring a taxpayer to transfer some of his income to Her Majesty to satisfy that debt, whatever income the taxpayer may choose, that is only an incidental effect of any taxation law.

[87] As stated by the Supreme Court of Canada in *Canadian Western Bank*, at paragraph 28, in discussing the corollary to the pith and substance approach:

> …legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional. At this stage of the analysis of constitutionality, the "dominant purpose" of the legislation is still decisive. Its secondary objectives and effects have no impact on its constitutionality: "merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law"…. By "incidental" is meant effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature…. Such incidental intrusions into matters subject to the other level of government's authority are proper and to be expected: *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 670….

[88] The second main argument of the Appellant is that the provision is not predominantly a revenue-raising measure and thus is not in pith and substance taxation. The Appellant's submissions in paragraphs 144 and 145, follow an analysis by the Appellant of the TFSA scheme and the stated purpose of the provision elicited from Technical Notes and Press Releases of the Minister are as follows:

> 144. Thus, it appears that the stated purpose of section 207.05 is predominantly to maintain the integrity of the TFSA scheme and target taxpayers who undertake "inappropriate transactions".
>
> 145. While section 207.05 has the effect of raising revenue, the raising of revenue is not the primary purpose or effect of section 207.05. Section 207.05 is not intended to apply to taxpayers in the ordinary course. In an ideal world, taxpayers would not undertake "inappropriate" transactions and as a result, section 207.05 would not apply and no revenue would be raised by the federal government. Section 207.05 is therefore not properly characterized in pith and substance as a revenue-raising measure but is instead intended to define the limit within which a TFSA may be used to earn tax-free income.

[89] The Appellant is essentially now unequivocally agreeing that the provision is an anti-avoidance provision designed to protect the integrity of the TFSA scheme.

[90] In my opinion, the Appellant's argument has no merit for the following reasons:

> 1. The Supreme Court of Canada has recognized that tax legislation is utilized for more than simply raising revenue. In *Québec (Communauté urbaine) v Corp. Notre-Dame de Bon-Secours*, [1994] 3 SCR 3 at pages 15-18 relied on by the Respondent:
>
> > This turning point in the development of the rules for interpreting tax legislation in Canada was prompted by the realization that the purpose of tax legislation is no longer simply to raise funds with which to cover government expenditure. It was recognized that such legislation is also used for social and economic purposes. … In our time it has been recognized that such legislation serves other purposes and functions as a tool of economic and social policy….

[91] As the Respondent has pointed out in its submission, the *Act* provides numerous examples of economic incentives like lower rates of tax on capital gains and capital gains exemption limits to encourage investment in small businesses, as well as financial incentives to implement social policy by way of tax credits to encourage charitable giving or further one's education or provide assistance to the disabled by way of example.

[92] I agree with the Respondent that tax rules designed to reduce or forego taxes reflect Parliament's choice on how to exercise its broad powers of taxation, which can include foregoing some or all tax as incentives to implement economic or social policies, but which logically include rules to provide penalties or greater taxation as disincentives to prevent abuse of incentive programs and protect the integrity of such programs delivered through the *Act*. In my view, a provision to protect the integrity of a taxation provision, be it to tax, provide an incentive or create a disincentive, is no less a legitimate provision relating to **Parliament's** broad powers to raise revenue within subsection 91(3), which section not only empowers Parliament to raise revenue "by any mode" but also by "any system" of taxation. The Canadian federal system of taxation contains deductions, exemptions, tax credits, penalties, anti-avoidance rules and a myriad of other provisions as part of its overall goal to raise revenue and so proper elements of

such system, including the anti-avoidance element the Appellant refers to, is by definition part of or entwined in the raising of revenue by a system of taxation contemplated by subsection 91(3) of the *Constitution* and thus is, in pith and substance, taxation.

[93] The Appellant himself acknowledges the above by the manner in which he quite correctly describes the TFSA scheme and the interrelationship of all its components at paragraph 137 of his submissions:

> 137. Section 207.05 can only be understood by reference to the overall scheme regulating TFSAs. As described above, that scheme generally provides an exemption from income tax in respect of income and gains from property held in a TFSA, provided the statutory requirements are met. The scheme comprises the definitions and other rules in respect of TFSAs in section 146.2, the exemption from tax in paragraph 149(1)(u.2), and the rules in Part XI.01 of the Act (sections 207.01 to 207.07), which impose special taxes relating to excess contributions, *prohibited investments* and *non-qualified investments*, and *advantages* in respect of registered plans including TFSAs.

2. The Appellant does not dispute that the legal effect of section 207.05 is to impose a tax, albeit one he finds severe and unjust, as he states time and time in his submissions by referring to the "imposing" a tax (see for example paragraphs 6, 7, 8, 26, 35, 38, 43, 50, 67), a "tax payable"(see for example paragraph 147, a "penalty tax"(see for example paragraph 56), the "100% tax" (see paragraph 150), a "tax equal to 100% of the increase in fair market value" (see paragraphs 136, 142, 146), an "advantage tax" (see paragraph 72) and a myriad of other similar expressions which clearly demonstrate the legal effect of the provision is to impose a tax. As suggested earlier, the fact the Appellant feels the legal effect goes beyond what is necessary to prevent taxpayers from obtaining unintended tax benefits, as a result of the 100 percent rate imposed, the method of taxing increases in the value of the fund even if there has been no realization event of the underlying property or taxing the holder of the trust instead of the trust, may make the mechanics of the provision unique (although they now apply to a wider range of registered plans like RRSPs and so are not so unique) does not change its characterization.

3. I agree with the Appellant that the practical effect of the tax imposed by 207.05 is to discourage certain specific transactions involving TFSAs that

are considered abusive and with the Respondent that section 207.05 has no effect outside the TFSA regime, does not apply generally to all savings or investment accounts and so is limited to what is in pith and substance taxation.

4. It follows from 3, that the anti-avoidance purpose of the provision, argued by the Appellant as being the primary purpose thereof, to predominantly "maintain the integrity of the TFSA" (see paragraph 144 of its submissions) earlier, is a purpose intertwined with the TFSA regime, and which I have earlier addressed as being a proper element of a system of taxation, that shows the provision is in pith and substance, a provision that is part of a system of, taxation. As the Respondent has pointed out, the Appellant admits that section 207.05 forms part of the broader TFSA scheme at paragraph 161 of its submissions:

> 161. The Appellant does not take issue with the constitutional validity of the Act as a whole or, in general, with the statutory scheme regulating TFSAs. The Appellant accepts that this legislation generally represents a valid exercise of the federal taxation power under subsection 91(3).

[94] I agree with the Respondent that the legal effects, practical effects and purpose of section 207.05 all point to taxation as its pith and substance. Accordingly, having found that the provision is in pith and substance taxation, and that, as the Appellant has admitted above, falls within both a valid TFSA scheme of taxation within a valid *Income Tax Act*, that such provision is *intra vires* in accordance with the principles of *Canadian Western Bank* at paragraph 25 and *General Motors* at page 667 earlier referred to, and there is no need for me to consider the Appellant's arguments on the ancillary doctrine principle which would only have applied if I had found the provisions were in pith and substance within provincial jurisdiction.

C. Conclusion

[95] For the above reasons, I find that the answer to both questions within this Motion is No. The Appellant shall pay the Respondent costs of this Motion, in either event of the cause.

This Amended Order and Amended Reasons for Order are issued in substitution of the Order and Reasons for Order dated September 25, 2018.

Signed at **Vancouver, British Columbia**, this 2nd day of **October** 2018.

"F.J. Pizzitelli"

Pizzitelli J.

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